

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

SEP 17 2010

Stephan Harris, Clerk
Cheyenne

Scott W. Meier (Wyo. Bar # 6-3116)
Lucas Buckley (Wyo. Bar # 6-3997)
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Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
THE DISTRICT OF WYOMING**

KIMBERLY POLK, an individual,

Plaintiff,

v.

MERITAIN HEALTH, INC., a New
York Corporation,

Defendant.

Case No.

10-CV-198-J

COMPLAINT

Kimberly Polk ("Polk"), complaining of and against Meritain Health, Inc. ("Meritain"), states and alleges as follows:

PARTIES

1. Plaintiff Polk is a citizen of the State of Wyoming, residing in Cheyenne, Laramie County, Wyoming.

2. Defendant Meritain is a foreign, for-profit corporation, organized under the laws of the State of New York, with its principal place of business located in Amherst, New York. Meritain is authorized to do business in Wyoming.

JURISDICTION AND VENUE

3. Polk hereby incorporates by reference all of the allegations contained in paragraphs 1 through 2 hereof inclusive, as if set forth herein in full.

4. This Court has subject matter jurisdiction over this action pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

5. Venue is proper in the District of Wyoming, pursuant to 29 U.S.C. § 1132(e)(2), because the relevant health plan is administered in Wyoming and the breach of the health plan occurred in Wyoming.

FACTUAL BACKGROUND

6. Polk hereby incorporates by reference all of the allegations contained in paragraphs 1 through 5 hereof inclusive, as if set forth herein in full.

7. On May 12, 2009, Polk sought treatment from Dr. John D. Bragg, at Laramie Physicians for Women and Children, PC, complaining of a pelvic mass which began a week prior.

8. Polk's personal physician, Dr. Babson, later diagnosed the pelvic mass as ovarian cancer in September 2009, which required chemotherapy treatment to combat.

9. In treating cancers such as Polk's with chemotherapy, an FDA approved, and widely used, method is to place an intravenous port in the chest near the clavicle and administer drugs known as Carboplatin and Taxol through the port.

10. This procedure is considered medically necessary to combat various types of cancer.

11. In December 2009, Polk had an intravenous port placed in her chest.

12. Polk was administered Carboplatin and Taxol through the port as a chemotherapy treatment.

13. In addition to the medically necessary treatment of Carboplatin and Taxol through the intravenous port, Polk also participated in a Phase III clinical trial of the drug Avastin.

14. Avastin was also administered through the intravenous port.

15. Approximately two weeks after having the intravenous port placed in her chest, Polk suffered complications in the form of an infection at the site of the port, requiring hospitalization at the University Hospital in Denver from January 12-14, 2010.

16. The January 12-14 hospitalization was the result of a medical emergency and all treatment received was medically necessary.

17. At all relevant times to this Complaint, Polk was an insured under an ERISA health plan (the "Plan") administered by Defendant and established by Cheyenne Radiology Group and MRI, P.C.

18. The Plan was established and is maintained for the purpose of providing medical,

surgical, hospital care, sickness and other benefits to beneficiaries and participants under the Plan.

19. The Plan was a self insured health plan through Cheyenne Radiology Group and MRI, P.C., which was the named fiduciary of the Plan.

20. Polk's medical expenses relating to the intravenous port infection were submitted to Defendant for benefits payments sometime between January 14, 2010, and January 21, 2010.

21. Defendant refused to certify Polk's claims for benefits on January 21, 2010, effectively denying payment and informing Polk of her right to appeal the decision. Defendant further expressly denied services in writing on February 9, 2010.

22. On behalf of Polk, Dr. John W. Wright, as an agent of Cheyenne Radiology Group & MRI, P.C., submitted an appeal of Polk's denial of benefits to Defendant on February 5, 2010.

23. On February 11, 2010, Defendant again denied benefits, citing Polk's participation in a Clinical Trial as the reason for denial of benefits relating to the infection of the intravenous port.

24. Polk requested another appeal on February 10, 2010, noting that an intravenous port "is standard treatment for ovarian cancer and is not experimental."

25. The February 10, 2010, appeal was denied by letter dated February 22, 2010, again for the reason that Polk was involved in a Clinical Trial. This letter noted that Polk had exhausted her internal appeals and had a right to sue under ERISA.

26. Defendant's refusal to pay for benefits has caused Polk significant damages in an amount to be proven at trial.

FIRST CAUSE OF ACTION
WRONGFUL DENIAL OF PAYMENTS UNDER 29 U.S.C. § 1132(a)

27. Polk hereby incorporates by reference all of the allegations contained in paragraphs 1 through 26 hereof inclusive, as if set forth herein in full.

28. The Employee Retirement and Income Security Act (ERISA) allows a civil suit by a plan participant or beneficiary to recover benefits due under the plan terms. 29 U.S.C. § 1132(a).

29. Defendant acted as a fiduciary in denying Polk benefits under the Plan, even when instructed by the Named Fiduciary, Cheyenne Radiology Group & MRI, P.C., to pay benefits.

30. Defendant failed to provide benefits due for a complication of a medically necessary treatment or procedure, namely the infection of the intravenous port, without a legitimate reason for doing so under the Plan.

31. Polk has incurred damages as a result of this failure to pay Plan benefits.

SECOND CAUSE OF ACTION
RECOVERY OF ATTORNEYS FEES AND COSTS UNDER 29 U.S.C. § 1132(g)

32. Polk hereby incorporates by reference all of the allegations contained in paragraphs 1 through 31 hereof inclusive, as if set forth herein in full.

33. Defendant's failure to pay benefits due and owing under the Plan has caused Polk to have to expend significant amounts in reasonable attorney's fees in order to recover benefits payments due.

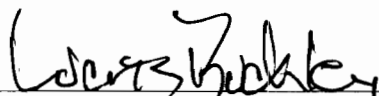
34. 29 U.S.C. § 1132(g) provides that this Court may, in its discretion, provide attorneys fees to Plaintiff in an amount to be proven at trial.

THEREFORE, Plaintiff demands judgment against Defendant for:

1. The cost of Plaintiff's treatment from January 12-14 for the emergency medical treatment she received at University Hospital in Denver, in an amount to be proven at trial;
2. Interest thereon at the statutory rate of seven percent (7%) under Wyoming law;
3. Reasonable attorneys fees and costs of the instant suit;
4. All other relief the court deems necessary and proper.

Dated this 17th day of September 2010.

HATHAWAY & KUNZ, P.C.



Scott W. Meier (Wyo. Bar # 6-3116)

Lucas Buckley (Wyo. Bar # 6-3997)

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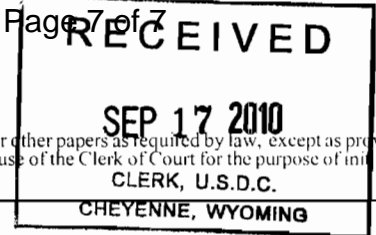
Fax: 307-634-0985

Attorneys for Plaintiff

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)



I. (a) PLAINTIFFS

KIMBERLY POLK

(b) County of Residence of First Listed Plaintiff Laramie
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Hathaway and Kunz, P.C. 2515 Warren Ave, Ste. 500 Cheyenne,
WY 82001 307-634-7723

DEFENDANTS

MERITAIN HEALTH, INC., a New York Corporation

County of Residence of First Listed Defendant Erie, New York
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known)

10CV198-J

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	PERSONAL PROPERTY	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 660 Occupational Safety/Health	SOCIAL SECURITY	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	LABOR	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise			<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	<input type="checkbox"/> 790 Other Labor Litigation	FEDERAL TAX SUITS	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	Habeas Corpus:	IMMIGRATION	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 462 Naturalization Application		<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 463 Habeas Corpus - Alien Detainee		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 465 Other Immigration Actions		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 550 Civil Rights			<input type="checkbox"/> 950 Constitutionality of State Statutes
	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

29 USC 1132

Brief description of cause:

ERISA claim for wrongfully denied benefits

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

09/16/2010

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

10036

AMOUNT

350.00

APPLYING IFP

JUDGE

MAG. JUDGE